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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. BRIAN MELVIN SHOLL, JR., Defendant and Appellant.	C085310 (Super. Ct. No. 15F04686)

Defendant Brian Melvin Sholl shot and killed Brian H. during an altercation where the victim disrespected Sholl and his gang. A jury found him guilty of second degree murder with an enhancement for personally discharging a firearm causing death. He was sentenced to an aggregate term of 40 years to life in state prison.

On appeal, he contends: 1) the admission of gang evidence was more prejudicial than probative; 2) the failure to specifically object to the gang evidence as cumulative constituted ineffective assistance of counsel; 3) the trial court violated his right to due

process when it reinstructed the jury in a way he contends was tantamount to a directed verdict; 4) remand is required for a hearing to permit him to make a record that will be relevant at his future youth offender parole hearing; and 5) remand is required to allow the trial court to exercise its discretion whether to strike the firearm enhancement.

We shall remand to allow defendant to make a record pertinent to his future youth offender parole hearing and to give the trial court the opportunity to exercise its discretion with regard to the firearm enhancement. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of July 29, 2015, Brian H. was drinking at Andre W.'s home in North Highlands. He left with his girlfriend, and then returned to the home after getting into an argument with her. In the interim, defendant and Orlando C. came to the house to visit Andre W. The house was in a Crips neighborhood of North Highlands, which is associated with the color blue. Defendant was described as "all flamed out" in a red shirt, hat, and shoes, a reference to wearing gang colors associated with the Bloods.[1]

When Brian H.'s girlfriend brought him back to the house, they continued to argue; he was belligerent and did not want to get out of the car, so Andre W. opened the passenger door and ordered him out. Defendant then approached and extended his hand, but Brian H. smacked his hand away and said he did not want to know defendant. Defendant said he was from North Highlands. Brian H. replied, "Fuck North Highlands. We kill you motherfuckers. Whoo-hoo. This is Del Paso Heights." He was yelling and standing very close to defendant. Orlando C. and Andre W. tried to separate defendant and Brian H.

Brian H. threatened defendant, saying that "he was going to show him some Level 3 shit," a reference to more dangerous offenders in prison. He then removed his hat and

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[1] Brian H. was also wearing a red hat. Orlando C. thought Brian H. may have assumed defendant was a Crip even though he was also wearing red.

shirt and came at defendant a third time. Orlando C. began to walk away, but then he heard shots, looked back, and saw Brian H. on the ground. A witness saw defendant walk to his car, return with a pistol, and fire at Brian H., who had remained standing in the same position on the curb while defendant went to his car. Defendant then fled. The victim died at the scene.

Defendant was charged with one count of murder. (Pen. Code,[2] § 187, subd. (a).) It was further alleged that defendant personally discharged a firearm causing death. (§ 12022.53, subd. (d).) Following a trial, a jury found defendant guilty of second degree murder and found the firearm allegation to be true. The trial court sentenced him to 15 years to life for murder and 25 years to life for the firearm enhancement.

DISCUSSION

I

Gang Evidence

Defendant contends the trial court violated his federal due process right to a fair trial when it admitted "inflammatory evidence indicating [defendant's] relationship with a Blood gang to establish a motive for the shooting when there was other compelling evidence to show motive and there was no gang enhancement alleged." We disagree because the court did not abuse its discretion.

"In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation -- including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like -- can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent

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[2] Further undesignated statutory references are to the Penal Code.

to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) "[E]ven where gang membership is relevant, because it may have a highly inflammatory impact on the jury[,] trial courts should carefully scrutinize such evidence before admitting it." (*People v. Williams* (1997) 16 Cal.4th 153, 193.) "We will disturb a trial court's exercise of discretion under Evidence Code section 352 only if the court's decision exceeds the bounds of reason." (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1519.)

Here, the trial court admitted evidence of defendant's red hat with gang embroidery, which was found in one of his cars and matched the description of the hat defendant wore at the time of the shooting. The deputy who discovered the hat identified it and testified that from his training and experience, the initials "NHB" and "95660" on the hat were gang insignia that referred to the North Highlands Bloods and the zip code in North Highlands. Defendant claims this evidence was cumulative and unduly prejudicial.

During the hearing on the motion to admit this evidence, the prosecutor acknowledged that he had not charged a gang enhancement but maintained that the evidence was probative of defendant's motive and identity.[3] The prosecutor further sought to have a detective testify to what the initials on the hat meant and to explain the gang culture around territorial disputes and disrespect. Defense counsel objected and requested that his objection be a continuing objection. The court reasoned that under Evidence Code section 352, the gang evidence was highly probative and unlikely to provoke an emotional response from the jury in the context of the overall body of evidence the jurors would already see and hear. The court also noted that the presentation of this evidence would be brief, ruling that "the balance factors weighs to allow it in."

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[3] The prosecutor initially sought to admit gang-related drawings found in defendant's home but did not ultimately introduce them into evidence.

Defendant contends the evidence was cumulative of other evidence offered to prove his motive, including Brian H.'s aggressive behavior and threats. Defendant further contends the evidence was minimally probative because this is not a clear case of a dispute between rival gangs.[4] He points out that Brian H. was not affiliated with any gang. This fact is irrelevant, however, to *defendant's* assumptions and motive. Brian H. told defendant, "Fuck North Highlands. We kill you motherfuckers. Whoo-hoo. This is Del Paso Heights." Based on this, defendant may have believed Brian H. was disrespecting the North Highlands Bloods or his neighborhood. There was testimony that defendant was "all flamed out" in his red shirt, red hat, and red shoes, a reference to wearing gang colors. The evidence defendant challenged merely added that the red hat he wore had embroidery referring to the North Highlands Bloods, which was not cumulative because it tended to show why Brian H. reacted aggressively when defendant told him where he was from and his disrespect toward defendant's gang and neighborhood may have, at least in part, motivated the shooting. The evidence was probative of defendant's motive.

The probative value of this evidence was not substantially outweighed by its prejudicial effect. (Evid. Code, § 352.) There was nothing particularly inflammatory about the gang evidence presented here, especially in comparison to the charged offense. The evidence did not consume undue time and was probative of both defendant's motive and identity. The trial court properly exercised its discretion in admitting the evidence, and defendant's argument of error fails.

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4 In support of his argument, defendant cites *People v. Avitia* (2005) 127 Cal.App.4th 185, where the appellate court held that gang evidence was improperly admitted. This case is distinguishable. There, the trial court admitted evidence of gang graffiti found in the defendant's bedroom, which was unrelated to any issue at trial and lacked probative value. (*Id.* at pp. 187, 193-194.) In contrast to the case at hand, there was no evidence tending to show that the motive for the charged crimes was gang related. (*Id*. at pp. 193-194.)

II

Ineffective Assistance Of Counsel

Defendant contends that his trial counsel was ineffective in failing to argue that the gang evidence was cumulative and failing to make specific objections to the admission of this evidence. We disagree because counsel's performance was not deficient.

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 691-692 [80 L.Ed.2d 674, 695-696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

" 'Surmounting *Strickland*'s high bar is never an easy task.' " (*Harrington v. Richter* (2011) 562 U.S. 86, 105 [178 L.Ed.2d 624, 642], quoting *Padilla v. Kentucky* (2010) 559 U.S. 356, 371 [176 L.Ed.2d 284, 297].) The reason *Strickland*'s bar is so high is that "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation.] . . . It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' " (*Richter*, at p. 105 [178 L.Ed.2d at pp. 642-643].) We will not consider defense counsel ineffective for failing to object when an objection would have been futile. (See *People v. Diaz* (1992) 3 Cal.4th 495, 562 [no claim for ineffective assistance of counsel based on defense counsel's failure to make a futile objection].)

Starting with the first prong of ineffective assistance of counsel, deficiency, defendant has the burden of showing that defense counsel's performance was deficient. (See *People v. Lucas* (1995) 12 Cal.4th 415, 436.) As we have noted, defense counsel

objected to the prosecutor introducing the gang evidence; argued that it was "character assassination," irrelevant, and more prejudicial than probative; argued that it was the victim who had a gang motive, not defendant; and requested that his objection be a continuing objection. The trial court overruled counsel's objections.

Counsel was not ineffective for failing to make an objection that the evidence was cumulative when such an objection would have been futile. The evidence was probative of defendant's motive and not cumulative. Defendant's theory of the case was that he acted in self-defense after he felt threatened by the victim, who was much bigger than him. The prosecution's theory of the case was that the victim disrespected defendant's gang and his neighborhood, which motivated defendant to escalate a verbal argument by going to his car, retrieving a pistol, and shooting the victim. The gang evidence was highly probative of the prosecution's theory of motive. It provided important context for the dispute that was not cumulative to the evidence defendant cited for his motive, fear of Brian H.'s aggression and threats. Whether the defendant was motivated by fear or retaliation was the main factual issue in this case where there was little question that defendant shot Brian H. and the jury's primary task was to determine the circumstances of the shooting. Accordingly, we conclude counsel's performance was not deficient.

III

Court Instructions On Voluntary Manslaughter

Defendant contends the trial court violated his federal due process right to a fair trial when it reinstructed the jury in a way he contends was tantamount to a directed verdict. We disagree.

A trial court may not "expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 766.) "The prohibition against directed verdicts 'includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the

effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true.' " (*People v. Figueroa* (1986) 41 Cal.3d 714, 724.)

In this case, after one day of deliberations, the foreperson informed the trial court that the jury was deadlocked on whether defendant was guilty of first or second degree murder. The court advised the jurors to review the instructions on the definitions of first and second degree murder and resume deliberations. The following morning, the foreperson again told the court that the jury was still deadlocked between first and second degree murder. The court inquired, "am I correct in interpreting your note as meaning that all of you, all 12 of you agree that the defendant is guilty of murder, you just don't agree on the degree." After the foreperson responded that was correct, the prosecutor moved to dismiss the first degree murder allegation for count one. The court granted the motion and instructed the jury to deliberate on second degree murder and voluntary manslaughter as possible verdicts.

The court then reinstructed the jury as follows: "I'm going to return you to the jury room to then consider and deliberate then on the issue of now second degree murder. That's the only option you have in terms of murder. Second degree. And there's also the lesser voluntary manslaughter. [¶] So I'll just repeat the instruction. If you all agree he's guilty of second degree murder, which is the only option you have in terms of murder right now, then fill out the verdict form saying that . . . . [¶] If you all agree that he's -- you can find him guilty, like I said, theoretically still, of voluntary manslaughter, but only if all of you agree he's not guilty of second degree murder. But that doesn't seem to be where you guys are going to go. But I have to give you that instruction nonetheless. [¶] And, of course, you can still give me a not guilty of either one. . . . [¶] . . . [¶] [A]gain, theoretically you can also find him guilty of voluntary manslaughter, but only if you all agree he's not guilty of second degree murder." Defense counsel did not object.

Defendant contends that the trial court's comment, "you can find him guilty, like I said, theoretically still, of voluntary manslaughter . . . . But that doesn't seem to be where you guys are going to go" was tantamount to a directed verdict for second degree murder. Defendant disregards the trial court's comments that immediately followed: "And, of course, you can still give me a not guilty of either one. . . . [¶] . . . [¶] [A]gain, theoretically you can also find him guilty of voluntary manslaughter, but only if you all agree he's not guilty of second degree murder." Accordingly, the court informed the jury that first degree murder was no longer an option and the remaining alternatives were second degree murder, voluntary manslaughter, or acquittal. The court's comment on where the jury appeared to be finding common ground merely reflected the trial court's understanding of what the jury said. It was not a directive, particularly when followed with the more specific directions about the jury's remaining alternatives.

Defendant analogizes his case to a number of cases where the appellate courts determined that the trial courts gave improper instructions tantamount to a directed verdict. In each of these cases, however, the trial court directed the jury to consider only one alternative or directed the jury in such a way that removed an element of the offense from consideration. (See *Powell v. Galaza* (9th Cir. 2003) 328 F.3d 558, 563-564 [jury instruction removed the only contested issue from consideration]; *People v. Miller* (1962) 57 Cal.2d 821, 828 [court ignored the issue of self-defense raised by the defendant and instructed the jury that it had to either find him innocent or guilty of murder in the first degree]; *United States v. Dillon* (5th Cir. 1971) 446 F.2d 598, 600-601 [court instructed the jury that the only issue was the credibility of witnesses and there was no reason to question the credibility of the government witnesses and every reason to question the defendant's credibility].) None of these cases involves anything akin to the passive comment by the court in the instant case about what the jury appeared to be thinking following a discussion about its deadlock. Accordingly, these cases are distinguishable, and we reject defendant's claim of error.

IV

Limited Remand

Defendant contends, and the People concede, that remand is required for a hearing to permit him to make a record of information that will be relevant at his future youth offender parole hearing. We accept the concession.

The trial court sentenced defendant to an aggregate prison term of 40 years to life for a murder he committed when he was 22 years old. Section 3051 provides that persons who were 25 years of age or younger when they committed their controlling offense are eligible for youth offender parole hearings during their 25th year of incarceration. In *People v. Franklin* (2016) 63 Cal.4th 261, 272, 277, after the defendant was sentenced to 50 years to life in prison for a murder he committed when he was 16 years old, the Legislature enacted sections 3051 and 4801, which entitled the defendant to a youth offender parole hearing. Our high court remanded the case for the limited purpose of determining whether the defendant was afforded an adequate opportunity to make a record of information that will be relevant to his future youth offender parole hearing. (*Franklin*, at pp. 284, 286-287.) Here, no evidence relevant to defendant's childhood and background was presented at his sentencing hearing. Therefore, as in *Franklin*, a limited remand is appropriate for the purpose of allowing defendant to make a record that will be relevant to his future youth offender parole hearing.

V

Section 12022.53 Firearm Enhancement

Defendant contends, and the People also concede, that his case must be remanded so the trial court can decide whether to strike the firearm enhancement under section 12022.53 pursuant to Senate Bill No. 620 (2017-2018 Reg. Sess.). We agree.

On October 11, 2017, the Governor signed Senate Bill No. 620, amending former sections 12022.5 and 12022.53, effective January 1, 2018 (Stats. 2017, ch. 682, §§ 1-2), to permit a trial court to strike a firearm enhancement: "The court may, in the interest of

justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§§ 12022.5, subd. (c); 12022.53, subd. (h).) Senate Bill No. 620 applies retroactively to nonfinal judgments. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091.) Because defendant was convicted and sentenced for a section 12022.53 enhancement and his conviction is not yet final, remand is required to allow the trial court to exercise its discretion whether to strike the firearm enhancement. (§ 12022.53, subd. (h).)

DISPOSITION

The matter is remanded to the trial court for the purposes of allowing defendant to make a record of information that will be relevant to his future youth offender parole hearing and for the trial court to consider whether to exercise its discretion to strike the section 12022.53 enhancement. The judgment is otherwise affirmed.

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Krause, J.